Zakaria bin Mohamad & Anor v Datuk Syed Sobri bin Syed Hashim & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22 NCvC-448–07 OF 2013
YEOH WEE SIAM J
10 APRIL 2015

Limitation — Action for recovery of land plus fraud — Whether limitation set in — Whether defendants committed fraud against plaintiffs — Whether circumstances did not allow plaintiffs to obtain specific performance of sale and purchase agreement of land but only damages in lieu thereof — Whether no damages allowable for fraud as plaintiffs failed to show they suffered damages thereby — Whether factual matrix did not support defendants' counterclaim for arrears of rental against plaintiffs for occupying property — Whether such claim in any event time-barred under s 6(1)(a) of the Limitation Act 1953

The plaintiffs were husband and wife. So were the defendants. In 1997, the first plaintiff rented the defendants' property for RM700 a month. On 2 August 2000, the plaintiffs agreed to buy the property for RM270,000 and entered into a sale and purchase agreement ('SPA') with the defendants. The plaintiffs secured a bank loan for RM230,000 and paid the defendants RM37,000 as deposit ('the deposit'). Following their receipt of the deposit, the defendants could not be traced or contacted making it unable for the plaintiffs to complete the loan documentation or the SPA because the defendants were required under the agreement to apply for and obtain prior consent from the relevant authority to the sale and ensure that the property was free of encumbrances. At the time of the SPA, the property was charged to the government while a private caveat had been lodged by a finance company ('Hong Leong'). Sometime in 2005, the plaintiffs discovered that the first defendant was a bankrupt and that bankruptcy proceedings were underway against the second defendant. In the instant action, the plaintiffs sought, inter alia, specific performance of the SPA, damages in lieu of, or in addition to, specific performance and damages for fraud. The defendants counterclaimed for, inter alia, arrears of rental amounting to RM109,200 from 1 August 2000–31 March 2013 and rental at market rate or double rental from 1 August 2013 until the date they received vacant possession of the property. Alternatively, or in addition, the defendants sought an order that they be allowed to deduct or set off the deposit against the arrears of rental owed by the plaintiffs. In reply to the defendants' contention that the plaintiffs' claim was time-barred under s 6(1)(a) of the Limitation Act 1953, the plaintiffs said their claim was not based on contract but was an action to recover land (for which the limitation period was 12 years) and that the claim was also founded on fraud (which

caused time, for the purposes of limitation, to begin to run only after the fraud was discovered).

Held, dismissing the defendants' counterclaim and the plaintiffs' claim for damages for fraud, granting the plaintiffs RM250,000 as damages (with interest thereon) in lieu of specific performance and ordering the plaintiffs to hand over vacant possession of the property to the defendants within one month of receipt of that sum:

(1) The plaintiffs' action was not time-barred under the Limitation Act 1953. The action was not founded on contract but was for recovery of land and it was also founded on fraud. Under s 9(1) of the Limitation Act 1953, the limitation period to bring an action for recovery of land was 12 years. A reasonable time to begin counting the 12 year limitation period in the instant case was one year from the date of execution of the SPA on 2 August 2000, considering that in the SPA no time-frame was imposed on the vendors to free the property from the government charge and Hong Leong's private caveat. The 12 years would end on 1 August 2013 and this action, being filed on 13 July 2013, was clearly within time. The defendants also had a valid cause of action founded on fraud. In accordance with s 29(a) and (b) of the Limitation Act 1953, the limitation period ran from the date of discovery by the plaintiffs of the fraud, ie in 2005, and the 12 years for the recovery of the land ran from 2005 until 2017 (see paras 19–20 & 36–37).

(2) The defendants had committed equitable fraud against the plaintiffs. By executing the SPA, the defendants were in a special relationship with the plaintiffs. At the time they executed the SPA, judgment had been entered by the EPF against the defendants. The defendants were not financially sound then. They collected the deposit of RM37,000 and disappeared and never attempted to contact the plaintiffs who only discovered, in 2005, that bankruptcy proceedings had been taken against the defendants (see para 35).

(3) Although the plaintiffs were entitled to specific performance of the SPA under cl 6.02 thereof, since the government's charge and Hong Leong's private caveat on the land had not been removed, it was not possible for the plaintiffs to obtain specific performance but only damages in lieu thereof. A sum of RM250,000 was a reasonable sum for damages considering the plaintiffs had only paid RM37,000 and had lived on the property until now without paying any rental (see paras 53–55).

(4) No damages for fraud was awarded as the plaintiffs had not shown proof that they had in fact suffered damages as a result of the defendants' fraud (see paras 58–59).

(5) The counterclaim had no legal basis and could not be allowed. There was no evidence of any written tenancy agreement between the parties either before or after the date of execution of the SPA. There was also no evidence that from 2 August 2000, the defendants had made any demands for monthly rental from the plaintiffs. It was more probable that what the first plaintiff had testified was true; that it was orally agreed between the parties that upon execution of the SPA, the plaintiffs would not have to pay the monthly rental of RM700 . If that was not true, the defendants would have demanded the monthly rental from 2 August 2000 onwards and not be silent for 13 years until 4 July 2013 when their solicitors sent a letter of demand for arrears of rental to the first plaintiff. Even if the defendants were claiming arrears of rental based on an oral tenancy agreement from 2 August 2000 onwards, such claim, being founded in contract, was barred by the six year limitation period under s 6(1)(a) of the Limitation Act 1953 (see paras 62–66).

[Bahasa Malaysia summary

Plaintif-plaintif adalah suami isteri. Begitu juga defendan-defendan. Pada tahun 1997, plaintif pertama telah menyewa hartanah defendan-defendan untuk RM700 sebulan. Pada 2 Ogos 2000, plaintif-plaintif telah bersetuju untuk membeli hartanah tersebut untuk RM270,000 dan memasuki perjanjian jual beli ('PJB') dengan defendan-defendan. Plaintif-plaintif telah memperoleh pinjaman bank untuk RM230,000 dan membayar defendan-defendan RM37,000 sebagai deposit ('deposit tersebut'). Berikutan penerimaan deposit tersebut, defendan-defendan tidak boleh dikesan atau dihubungi menjadikan plaintif-plaintif tidak berupaya untuk menyelesaikan pendokumentasian pinjaman atau PJB itu kerana defendan-defendan dikehendaki di bawah perjanjian itu untuk memohon untuk dan memperoleh persetujuan terdahulu daripada pihak berkuasa yang kaitan dengan jualan itu bagi memastikan bahawa hartanah itu bebas daripada sekatan. Pada masa PJB itu, hartanah itu telah dicagarkan kepada kerajaan manakala kaveat persendirian telah dimasukkan oleh syarikat kewangan ('Hong Leong'). Sekitar 2005, plaintif-plaintif mendapati bahawa defendan pertama telah bankrap dan bahawa prosiding kebankrapan sedang dilaksanakan terhadap defendan kedua. Dalam tindakan ini, plaintif-plaintif memohon, antara lain, pelaksanaan spesifik PJB itu, ganti rugi menggantikan, atau sebagai tambahan kepada, pelaksanaan spesifik dan ganti rugi untuk fraud. Defendan-defendan menuntut balas untuk, antara lain, tunggakan sewa berjumlah RM109,200 dari 1 Ogos 2000–31 Mac 2013 dan sewa pada kadar pasaran atau sewa berganda dari 1 Ogos 2003 hingga tarikh mereka menerima milikan kosong hartanah itu. Sebagai alternatif, atau tambahan, defendan-defendan memohon perintah agar mereka dibenarkan memotong atau mengetepikan deposit tersebut dengan tunggakan sewa yang terhutang oleh plaintif-plaintif. Sebagai jawapan kepada hujah defendan-defendan bahawa tuntutan plaintif-plaintif telah luput had masa di bawah s 6(1)(a) Akta Had Masa 1953, plaintif-plaintif

mengatakan tuntutan mereka tidak berdasarkan atas kontrak itu tetapi adalah tindakan untuk mendapat balik tanah (yang mana tempoh had masa adalah 12 tahun) dan bahawa tuntutan itu juga berasaskan fraud (yang menyebabkan masa, bagi tujuan had masa, bermula hanya selepas fraud diketahui).

Diputuskan, menolak tuntutan balas defendan-defendan dan tuntutan plaintif-plaintif untuk ganti rugi bagi fraud, memberikan plaintif-plaintif RM250,000 sebagai ganti rugi (dengan faedah ke atasnya) menggantikan pelaksanaan spesifik dan memerintahkan plaintif-plaintif menyerahkan milikan kosong hartanah itu kepada defendan-defendan dalam tempoh satu bulan menerima jumlah itu:

(1) Tindakan plaintif-plaintif tidak luput had masa di bawah Akta Had Masa 1953. Tindakan itu tidak berasaskan kontrak tetapi untuk mendapat balik tanah itu dan ia juga berasaskan fraud. Di bawah s 9(1) Akta Had Masa 1953, tempoh had masa untuk memulakan tindakan untuk mendapat balik tanah adalah 12 tahun. Masa yang munasabah untuk mula mengira tempoh had masa 12 tahun itu dalam kes ini adalah satu tahun dari tarikh pelaksanaan PJB itu pada 2 Ogos 2000, dengan mengambil kira bahawa dalam PJB itu tiada tempoh masa dikenakan ke atas penjual-penjual untuk membebaskan hartanah itu daripada gadaian kerajaan dan kaveat persendirian Hong Leong. Tempoh 12 tahun itu berakhir pada 1 Ogos 2013 dan tindakan ini, yang difailkan pada 13 Julai 2013, jelas dalam had masa. Defendan-defendan juga mempunyai kausa tindakan yang sah berasaskan fraud. Menurut s 29(a) dan (b) Akta Had Masa 1953, tempoh had masa bermula dari tarikh pengetahuan tentang fraud itu oleh plaintif-plaintif iaitu pada 2005, dan 12 tahun untuk mendapat balik tanah itu bermula dari 2005 hingga 2017 (lihat perenggan 19–20 & 36–37).

(2) Defendan-defendan telah melakukan fraud yang saksama terhadap plaintif-plaintif. Dengan melaksanakan PJB itu, defendan-defendan mempunyai hubungan istimewa dengan plaintif-plaintif. Pada masa mereka memasuki PJB itu, penghakiman telah dimasuki oleh KWSP terhadap defendan-defendan. Defendan-defendan tidak stabil dari segi kewangan pada masa itu. Mereka telah mengutip deposit RM37,000 itu dan hilang dan tidak cuba untuk menghubungi plaintif-plaintif yang hanya mendapati, pada 2005, bahawa prosiding kebankrapan telah diambil terhadap defendan-defendan (lihat perenggan 35).

(3) Walaupun plaintif-plaintif berhak kepada pelaksanaan spesifik PJB itu di bawah fasal 6.02, oleh kerana gadaian kerajaan dan kaveat persendirian Hong Leong atas tanah itu tidak dikeluarkan, ia mustahil untuk plaintif-plaintif memperoleh pelaksanaan spesifik tetapi hanya ganti rugi sebagai ganti. Sejumlah RM250,000 adalah jumlah yang munasabah untuk ganti rugi dengan mengambil kira plaintif-plaintif hanya telah

membayar RM37,000 dan telah tinggal di hartanah itu sehingga sekarang tanpa membayar apa-apa sewa (lihat perenggan 53–55).

(4) Tiada ganti rugi untuk fraud telah diawardkan kerana plaintif-plaintif tidak menunjukkan bukti bahawa mereka sebenarnya mengalami kerugian akibat fraud defendan-defendan (lihat perenggan 58–59).

(5) Tuntutan balas itu tidak mempunyai asas sah dan tidak boleh dibenarkan. Tiada keterangan tentang apa-apa perjanjian penyewaan antara pihak-pihak sama ada sebelum atau selepas tarikh pelaksanaan PJB itu. Tiada juga keterangan bahawa dari 2 Ogos 2000, defendan-defendan telah membuat apa-apa tuntutan untuk sewa bulanan daripada plaintif-plaintif. Ia lebih berkemungkinan bahawa apa yang plaintif beri keterangan adalah benar; bahawa ia secara lisan dipersetujui antara pihak-pihak bahawa setelah pelaksanaan PJB itu, plaintif-plaintif tidak perlu membayar sewa bulanan RM700. Jika itu tidak benar, defendan-defendan pasti telah menuntut sewa bulanan dari 2 Ogos 2000 seterusnya dan tidak berdiam diri selama 13 tahun sehingga 4 Julai 2013 apabila peguamcara mereka menghantar surat tuntutan untuk tunggakan sewa kepada plaintif pertama. Jikapun defendan-defendan menuntut tunggakan sewa berdasarkan perjanjian penyewaan secara lisan dari 2 Ogos 2000 seterusnya, tuntutan sebegini, yang berasaskan kontrak, telah dihadkan oleh tempoh had masa enam tahun di bawah s 6(1)(a) Akta Had Masa 1953 (lihat perenggan 62–66).]

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Cheng Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 1 MLRA 546, CA (refd)

Kitchen v Royal Air Forces Association and Others [1958] 2 All ER 241, CA (refd)

Lim Yoke Kong v Sivapiran Sabapathy [1992] 2 MLJ 571; [1992] 1 MLRA 224, SC (refd)

Nasri v Mesah [1971] 1 MLJ 32; [1970] 1 MLRA 363, FC (refd)

Ng Moh v Tan Bok Kim & Anor [1969] 1 MLJ 46; [1968] 1 MLRA 877, FC (refd)

Tee Ban Tiong v RHB Bank Berhad [2014] MLRHU 1 (refd)

Legislation referred to

Limitation Act 1953 ss 6(1)(a), 9(1), 29(a), (b)

Limitation Act 1939 [UK] ss 26, 26(b)

Clinton Gomez (Rajindar Singh Veriah with him) (Rajindar Singh Veriah & Co) for the plaintiffs.

Mohd Nor bin Mohamad (Siti Zaharah bte Mat with him) (Wong Chooi & Mohd Nor) for the defendants.

Yeoh Wee Siam J:

BACKGROUND FACTS

[1] The first and second plaintiffs are husband and wife. The first and second defendants are also husband and wife.

[2] The first plaintiff, an engineer, worked for the first defendant in the latter's company, Kulim Enterprise Bhd, as a technical director from 1995–1997.

[3] The defendants are the registered owners of the land held under HS(M) 5173, PT No 6358, Mukim Ulu Kelang, Daerah Gombak, Negeri Selangor, together with a house erected on it and bearing the postal address No 35, Jalan AU5D/2A, Lembah Keramat, 54200 Kuala Lumpur ('the property').

[4] In 1997 the first plaintiff began to rent the property from the defendants at a rental of RM700 per month.

[5] Via a sale and purchase agreement dated 2 August 2000 ('SPA') (IDB1 Pt B pp 2–13) entered into between the defendants, as vendors, and the plaintiffs, as purchasers, the defendants agreed to sell and the plaintiffs agreed to purchase the property at the price of RM270,000.

[6] Upon execution of the SPA, the plaintiffs paid the defendants the sum of RM27,000 as a deposit, and a further sum of RM10,000 on 19 September 2000.

[7] Sometime on or about 12 July 2000, the plaintiffs secured a loan of RM230,000 from Citibank Bhd ('Citibank') to assist them in the purchase of the property. Citibank was represented by its solicitors, Messrs Mah-Kamariah & Partners.

[8] The plaintiffs contended that inspite of repeated letters from Messrs Mah-Kamariah & Partners, including the letter dated 6 August 2001 (IDB1 Pt B pp 16–17) to the defendants' solicitors, Messrs Saleem & Co, requesting for the completion date and completion of loan documentation, M/s Saleem & Co failed to respond to Messrs Mah-Kamariah & Partners.

[9] The plaintiffs further contended that the plaintiffs have fraudulently refused to complete the sale and purchase of the property to the plaintiffs.

[10] The particulars of fraud pleaded include the plaintiffs' allegation that

after receiving the sum of RM37,000, the defendants could not be located or had disappeared and there was no way that the plaintiffs could contact them.

[11] Sometime on or around 2005, the plaintiffs discovered that the first defendant had been declared a bankrupt and that the second defendant was in the process of being declared a bankrupt.

[12] Currently, the first defendant has been discharged as a bankrupt, but the second defendant is still an undischarged bankrupt. The plaintiffs have obtained leave to commence proceedings against the second defendant.

[13] On or about 25 March 2013, a person by the name of Syed Bakri ('DW2'), claiming to be the son of the defendants, called upon the plaintiffs at the property and made two offers to the plaintiff:

(a) that the defendants were prepared to sell the property to the plaintiffs at a new purchase price, and that the plaintiffs pay arrears of rental; or

(b) that the plaintiffs give vacant possession of the property to the defendants.

THE PLAINTIFFS' CLAIM

[14] Vide para 18 of the plaintiffs' amended statement of claim, the plaintiffs are applying for the following reliefs:

18.1	Specific Performance of the SPA dated 2 August 2000;
18.2	Damages as an alternative or in addition to Specific Performance;
18.3	Further or as an alternative, Damages for fraud;
18.4	Interest on the Damages at the rate of 5% per annum from the date of filing of the Writ of Summons until the date of realization.
18.5	Costs;
18.6	Any other reliefs as the Court deems appropriate and just.

THE DEFENDANTS' COUNTERCLAIM

[15] The defendants made a counterclaim against the plaintiffs for, inter alia, the following:

(a) payment of arrears of rental amounting to RM109,200 from the 1 August 2000 until 31 March 2013;

(b) payment of monthly rental at market rate or double rental from

1 August 2013 until the date of vacant possession of the property by the plaintiffs.

(c) the plaintiffs are required to give vacant possession of the property to the defendants in a perfect and habitable condition without any damage;

(d) interest on any payment required to be paid by the plaintiffs to the defendants at the rate of 5%pa from the date of filing of this action until the date of full realisation;

(e) alternatively or in addition, the deposit of RM37,000 which had been paid by the plaintiffs to the defendants be deducted or set-off with all arrears of rental owed by the plaintiffs to the defendants; and

(f) any other reliefs as deemed appropriate, suitable and just by this c court.

CONSIDERATION AND FINDINGS

Whether the plaintiffs' action is time-barred

[16] The defendants contended that the plaintiff's action is caught by s 6(1)(a) of the Limitation Act 1953 ('Act 254') which provides that an action founded on a contract or on tort 'shall not be brought after the expiration of six years from the date on which the cause of action accrued'.

[17] Learned counsel for the defendants submitted that under cl 5 of the SPA dated 2 August 2000, the balance of the purchase price is to be paid by the purchasers to the vendors within three months of the purchasers' solicitor's receipt of the letter of consent by the relevant authority. An extension of one month is provided for to complete the purchase.

[18] Learned counsel for the defendants further submitted as follows:

> 5. In as much as this was an obligation on the part of the Vendors to obtain the Consent and there was no evidence that the Vendors had attempted to obtain such consent and noting that Purchasers had paid RM37,000 towards pp, and at least 1 year later no development had been made in this respect, and applying the reasonable period rule, it could not have been thought otherwise than that the Vendors had failed to perform their obligation. *At that time the cause of action had arisen.* When that happens Clause 6.02 arises and Purchasers were entitled to specific performance and consequential reliefs against the Vendors. *Counting time from the date of S & P Agreement to 1 year later plus say 3 months would have taken it to end of November, 2001. Accrual of cause of action would have commenced 1 December 2001 and 6 years hence would have been 30 November 2007. To commence action on 15.07.2013 is clearly out of time.* Refer Tab 4 pp 107 – 108, 110. (Emphasis added.)

[19] If this action is founded on contract, then I would agree with learned counsel for the defendants that this action, being filed on 15 July 2013, is time-barred under s 6(1)(a) of Act 254. However, as submitted by learned counsel for the plaintiffs, this action is not founded on contract, but for recovery of land and also founded on fraud.

[20] Under s 9(1) of Act 254, the limitation period to bring an action for recovery of land is 'twelve years from the date on which the right of action accrued'.

[21] In *Nasri v Mesah* [1971] 1 MLJ 32; [1970] 1 MLRA 363, the Federal Court held:

> It follows therefore that whether the action is for Specific Performance of an agreement for the sale of land or for a declaration of title to land, it is essentially an action to recover land, so that the period for limitation would be 12 years in either case.

(See also *Tee Ban Tiong v RHB Bank Berhad* [2014] MLRHU 1 at pp 5–6).

[22] Since learned counsel for the defendants in his written submissions dated 25 February 2015 and filed on 26 February 2015 has conceded and taken the date, 1 December 2001, to count time for accrual of action, the period of limitation in this action for specific performance, which is for recovery of land, should be 12 years from 1 December 2001. The 12 years would end on 30 November 2013. Therefore, this action, which was filed by the plaintiffs on 15 July 2013, is still within the 12 years from the date on which the right of action accrued, and hence is not time-barred by Act 254.

[23] Notwithstanding the above stand, I note that learned counsel for the defendants in his final written submissions dated 11 March 2015 and filed on 12 March 2015 later changed his position and submitted, inter alia, at pp 7–8 that the plaintiffs are caught by limitation as follows:

> (f) The S&P Agreement is dated 2 August, 2000. Purchasers (plaintiffs) are required to pay the balance purchase price within 3 months of their solicitors receiving the letter of consent from the authority – see Clause 5.01 (a) S&P Agreement at pg 07 IDB1). This means Vendors (Defendants) have an obligation to apply for such consent and to facilitate such application no caveat, private or otherwise, must tie up the property. Parties are aware of a caveat by HLFB and Vendors (Defendants) have promised to uplift it – Clauses 2.07 and 2.08 S&P Agreement at pg 06 IDB1).
>
> (g) There is no evidence that any attempt was ever made to uplift the caveat or to apply for the consent of the authority. Loan had been approved to the purchasers and, it can be inferred that Mah-Kamariah & Partners had informed Saleem & Co thereof and among other things, had been asking for the letter of consent. ...

[24] Learned counsel for the defendants then cited *Ng Moh v Tan Bok Kim & Anor* [1969] 1 MLJ 46; [1968] 1 MLRA 877 where Azmi (Malaya) CJ for the Federal Court stated:

> In my view, the cause of action in this case accrued on Lim Pheng's failure to take the necessary action under cl 2 of the agreement after a lapse of 14 days from the the date of letter D8. This failure to initiate the necessary action appeared to be the first clear unequivocal threat to infringe appellant's right.

[25] Applying the above principle, learned counsel for the defendants then submitted:

(a) the S&P Agreement is dated 2 August, 2000;

(b) in the face of knowledge of the loan and undertaking to uplift the caveat and their obligation to obtain and deliver the consent from the authority, Vendors' (Defendants') failure to initiate necessary action was the first clear unequivocal threat to not perform;

(c) giving it 6 months would have taken it to 2 February, 2001 and the cause of action, if at all, arose on 3 February, 2001;

(d) 12 years thence would have taken it to 2 February, 2013;

(e) accordingly, suit having been filed on 11 July, 2013 was statue-barred.

[26] With respect, learned counsel for the defendants cannot blow hot and cold here by taking two different dates to count the limitation period ie from 1 December 2001, and from 3 February 2001.

[27] I am of the view that a reasonable time to count the 12 years of period of limitation is one year (and not even one year plus three months as learned counsel for the defendants had earlier conceded) from the date of execution of the SPA on 2 August 2000, considering that in the SPA there was no time frame imposed on the vendors to take steps to free the property from the government charge and Hong Leong's private caveat. The 12 years would end on 1 August 2013, and this action, being filed on 13 July 2013, is still clearly within the 12 years of period of limitation.

[28] The plaintiffs further relied on s 29 of Act which provides that for an action based on fraud of the defendants or the right of action is concealed by the fraud, 'the period of limitation shall not begin to run until the plaintiff has discovered the fraud ... or could with reasonable diligence have discovered it'.

Whether there is fraud by the defendants

[29] The question now is whether the defendants have committed fraud against the plaintiffs.

[30] The plaintiffs contended that the defendants, after executing the SPA and after collecting the sum of RM37,000, completely became uncontactable. The plaintiffs called upon the defendants at their address given in the SPA at Country Heights, Kajang, Selangor, but the defendants were nowhere to be found. Further, the plaintiffs also tried to locate the defendants in Kedah and again could not be contacted.

[31] The defendants did not disclose to the plaintiffs, at the time when they executed the SPA on 2 August 2000, that in 1999 a judgment was entered against the defendants by the Employees Provident Fund ('EPF') for RM717,000. In 2003 bankruptcy proceedings were filed against the defendants by EPF (IDB2 Pt C pp 1–17).

[32] The defendants never attempted to communicate with the plaintiffs until March 2013. It was only in 2005 that the plaintiffs discovered that bankruptcy proceedings were commenced against the defendants.

[33] The second defendant ('DW1') admitted during her cross-examination that the defendants had disappeared because of the suits filed against the defendants. However, she and her husband (second defendant) are now living in Ampang.

[34] In *Lim Yoke Kong v Sivapiran Sabapathy* [1992] 2 MLJ 571 at p 578; [1992] 1 MLRA 224 at p 228, the Supreme Court, in dealing with the meaning of 'fraud' in s 29(b) of the Limitation Act 1953 referred to s 26 of the UK Limitation Act 1939 which is in pari materia with our s 29 and quoted Lord Evershed MR in *Kitchen v Royal Air Forces Association and Others* [1958] 2 All ER 241, inter alia, as follows:

> It is now clear, however, that the word 'fraud' in s 26(b) of the UK Limitation Act 1939, is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman v ARTS Ltd* [1949] 1 AER 465 that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, *having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other.* (Emphasis added.)

[35] In this case, there is no evidence that the defendants committed fraud against the plaintiffs in a criminal sense. However, by executing the SPA, the defendants were in a special relationship with the plaintiffs. Therefore, applying the above meaning of 'fraud' in *Kitchen*, I am of the opinion that in the present case, there is equitable fraud committed by the defendants against the plaintiffs. At the time when they executed the SPA on 2 August 2000, there

was already the judgment given in favour of EPF against the defendants. It is apparent that the defendants were not financially sound then. Otherwise they would not be adjudged as bankrupt later. However, the defendants collected the sum of RM37,000 and then disappeared. They never attempted to contact the plaintiffs. The plaintiffs later discovered their bankruptcy in 2005.

[36] Since the defendants have a valid cause of action founded on fraud, then in accordance with s 29(a) and (b) of the Limitation Act 1953, the period of limitation shall run from the date of discovery by the plaintiffs of the fraud ie 12 years (ie period of limitation for recovery of land) from 2005 until 2017. Therefore this action, which was filed on 15 July 2013, is still within the period of limitation.

[37] For the reasons stated above, the plaintiff's action is not time-barred under the Limitation Act 1953.

Whether the plaintiffs are entitled to specific performance of the spa

Whether the plaintiffs were ready, willing and able to perform the SPA

[38] The evidence of the first plaintiff (PW1) is that at all times the plaintiffs are willing and able to complete the SPA.

[39] The purchase price was RM270,000. The plaintiffs paid a deposit of RM27,000 when the SPA was executed on 2 August 2000 (IDB2 Pt B p 6, cl 4.01 of the SPA). A further sum of RM10,000 was paid to the defendants on 19 September 2000 leaving a balance of RM233,000 (IDB1 Pt B pp 14–15).

[40] The plaintiffs had obtained a loan of RM230,000 from Citibank (IDB1 Pt B p 1). Messrs Mah-Kamariah & Partners had been appointed by Citibank to do the loan documentation. They sent several letters and reminders to the defendants' solicitors, Messrs Saleem & Co (IDB1 Pt B pp 16–17).

[41] The second defendant (DW1) had not seen the letter of M/s Mah-Kamariah & Partners dated 6 August 2001 asking for the loan documentation and completion date. She stated that she had instructed her solicitors to follow up with the SPA. However, there were no documents from her or her solicitors to prove this. Her solicitors did not reply at all to the solicitors of Citibank.

[42] In *Aik Ming (M) Sdn Bhd & Ors v Cheng Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 at p 821; [1995] 1 MLRA 546 at p 593 the Court of Appeal held:

> The second proposition which I accept as well settled is that the knowledge of a solicitor is regarded by the law as knowledge of the client ... so it is not open to the client to say that the solicitor did not disclose the true facts to him.

[43] It is therefore not open to the second defendant (DW1), who testified on behalf of both defendants, to blame their own solicitors, Messrs Saleem & Co, and allege that they did not inform her of the SPA transaction.

[44] The evidence shows that the plaintiffs had obtained the Citibank loan to purchase the property. The defendants did not communicate with the plaintiffs after the execution of the SPA.

[45] The plaintiffs' loan had lapsed due to the defendants' delay in completing the SPA. However, the first plaintiff (PW1) confirmed that he has the means to pay for the property by withdrawing his savings in the EPF and from other sources.

Whether the defendants were ready, willing and able to perform the SPA

[46] The following clauses of the SPA under recitals, article 2 of the SPA are noted:

> Clause 2.02
>
> The Said Property is presently charged to Treasury of the Government of Malaysia (hereinafter called 'the Chargee') as security for a loan granted to the Vendors.
>
> Clause 2.03
>
> The property is a leasehold for 99 years and the same expires on the 30th day of December 2086.
>
> Clause 2.04
>
> The Purchasers have conducted their own searches of the titles to the Said Property and are aware of the express conditions and restrictions in interest that the property cannot be leased, mortgaged or transferred without the expressed consent of the Authority.
>
> Clause 2.05
>
> The Vendors have offered to sell the Said Property to Purchasers and the Purchasers have agreed to buy the Said Property on the terms and conditions hereinafter provided.' ;
>
> Clause 2.07
>
> The Individual Title Deed to the said Property is encumbered with a private caveat lodged by Hong Leong Finance Berhad vide Presentation No 2273/98, Jilid 76, Folio 71 dated 29th May 1998.

Clause 2.08

The Vendors hereby give their undertaking to uplift the said caveat to enable the parties to present the Transfer of the property with the relevant Land Office.

[47] As can be seen from the above clauses, at the time when the SPA was executed, the property was still charged to the Government of Malaysia ('the government charge'). There was also an existing private caveat lodged by Hong Leong Finance Bhd ('Hong Leong'). It is therefore the defendants' obligation to free the property from the government charge and Hong Leong's private caveat. However, there is no proof that the defendants have done so.

[48] The second defendant stated that the letter of consent from the relevant authority was obtained but it was not produced in court.

[49] The second defendant admitted during cross-examination that until today the government charge and Hong Leong's private caveat are still on the property.

[50] By a letter dated 4 July 2013, the defendants' solicitors, Messrs Wong Chooi & Mohd Nor (IDB1 Pt B pp 2–29) informed the plaintiffs, inter alia:

Walaubagaimanapun seperti yang Tuan sedia maklum bahawa proses jual beli dan pindah milik harta tersebut tidak dapat disempurnakan akibat terdapat halangan Kaveat persendirian yang dimasukkan oleh Hong Leong Bank Berhad ke atas harta tersebut dan fakta ini berada dalam pengetahuan Tuan.

[51] In view of the defendants' undertaking under cl 2.08 of the SPA to uplift Hong Leong's private caveat, the above excuse of the defendants cannot be accepted.

[52] Clause 6.02 of the SPA provides as follows:

If the Vendors fail to complete the sale of the Said Property upon the Purchasers' fulfilling all the Purchasers' obligations herein, the Purchasers shall be entitled to the remedy of specific performance against the Vendors and to all reliefs following therefrom.

[53] In this case, all that remained and was required to be done by the plaintiffs is to pay the balance of the purchase price, ie the sum of RM233,000, to the defendants pursuant to the SPA. The plaintiffs had already obtained the Citibank loan but the loan documentation could not be completed since the defendants and their solicitors had never replied the letters of Citibank's solicitors or taken any action to fulfil their obligations under the SPA so that

the agreement could be completed. Accordingly, the plaintiffs are entitled to specific performance of the SPA under cl 6.02 of the SPA.

[54] However, since the first defendant testified that the government charge and Hong Leong's private caveat have not been removed, it would not be possible for the plaintiffs to obtain specific performance of the SPA. This means that the plaintiffs can be allowed the alternative relief of damages.

[55] For the alternative relief of damages, I bear in mind that so far the plaintiffs have only paid RM37,000. They have also lived in the property since 2 August 2009 until now without paying any monthly rental. The value of what the plaintiffs have enjoyed in terms of not having to pay a monthly rental all these years is clearly seen from the defendants' counterclaim for the sum of RM109,200 being arrears of rental from 2 August 2000 ie the date of execution of the SPA. The balance of the purchase price under the SPA is RM233,000. The plaintiffs would have to pay this amount of RM233,000 to the defendants before the title to the property can be transferred to them. The court takes judicial notice of the fact that the prices of property in Kuala Lumpur have increased tremendously since 2 August 2000, especially in the last five years. The plaintiffs would have benefitted greatly from the property's appreciation from the time of purchase at a mere purchase price of RM270,000 until now. Thus, if the specific performance is not possible, I think a sum of RM250,000 is a reasonable sum to be paid as damages as an alternative remedy to the plaintiffs.

Whether damages should be awarded for fraud

[56] I have held earlier that there is fraud committed by the defendants when they disappeared after collecting the RM37,000 from the plaintiffs and did not complete the transfer of the property to the plaintiffs.

[57] However, it is observed that from the date of execution of the SPA on 2 August 2000 until now, the plaintiffs have been occupying the property without payment of monthly rental.

[58] The plaintiff did not show proof that they have in fact suffered any damages as a result of the defendants' fraud. Damages have to be proved before the court can assess the damages.

[59] Since there is no proof of damages, I do not think that damages should be awarded here to the plaintiffs for the defendants' fraud.

THE DEFENDANTS' COUNTERCLAIM

[60] The first plaintiff testified at the time when the SPA was executed, it was agreed between both parties that the plaintiffs do not have to pay monthly rental.

[61] The second defendant (DW1) and DW2 testified that arrears of rental amounting to RM109,200 from 1 August 2000 until 31 March 2013 were due from the plaintiffs.

[62] There is no evidence of any written tenancy agreement being concluded between the two parties either before the date of execution of the SPA on 2 August 2000, or after that date.

[63] There is also no evidence, whether oral or documentary, that from 2 August 2000 the defendants had made any demands for monthly rental from the plaintiffs.

[64] It is more probable that what the first plaintiff testified is true, that it was orally agreed between the two parties that upon the execution of the SPA, the plaintiffs do not have to pay the monthly rental of RM700, which was payable before 2 August 2000. If it is not true, then the defendants would have demanded for such monthly rental from the plaintiffs from 2 August 2000 onwards, and not be silent for 13 years until 4 July 2013 when the defendants' solicitors sent the letter of demand, inter alia, for arrears of rental to the first plaintiff (IDB Pt B pp 28–29).

[65] It is also to be noted that if the defendants are claiming arrears of rental based on an oral tenancy agreement from 2 August 2000 onwards, such claim, since it is founded on contract, is barred by the period of limitation of six years as provided by s 6(1)(a) of the Limitation Act 1953.

[66] For the above reasons, the defendants' counterclaim has no legal basis and cannot be allowed.

DECISION

[67] Based on the above considerations, on a balance of probabilities, the court decides as follows:

Regarding the plaintiffs' amended statement of claim

Prayer 18.1 : Not allowed;

Prayer 18.2 : Damages of RM250,000 allowed as an alternative to specific performance. Upon payment of this sum by the defendants, the plaintiffs are required to deliver vacant possession of the property within one month from the date of such payment;

Prayer 18.3 : Not allowed;

Prayer 18.4 : Interest on the damages in prayer 18.2 at 5% per annum from the date of filing of the writ of summons until the date of realisation;

Prayer 18.5 : Costs of RM15,000 are to be paid by the defendants to the plaintiffs.

Regarding the defendants' counterclaim

The counterclaim is dismissed. No order as to costs.

Order accordingly.

Reported by Ashok Kumar